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In the Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE STATE OF TEXAS ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND JUDICIAL DISTRICT OF TEXAS

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review a decision of the Court of Civil Appeals for the Second Judicial District of Texas reversing a judgment of the District Court of Gregg County, Texas.

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas (R. 66) is reported in 138 S. W. (2d) 924. The opinion of the Supreme Court of Texas (R. 58) answering the certified questions is reported in 134 Tex. 476, 133 S. W. (2d) 963.

JURISDICTION

The judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas was entered on March 15, 1940 (R. 65). The application by the United States for a writ of error was denied by the Supreme Court of Texas on October 2, 1940 (R. 82), and a motion for rehearing (R. 82) was overruled by the Supreme Court of Texas on October 30, 1940 (R. 83). On January 23, 1941, Mr. Justice Black extended the time within which the United States might file a petition for a writ of certiorari for a period of 60 days from January 30, 1941 (R. 84).

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, on the ground that the decision below denied a title, right, privilege or immunity claimed by the United States under Section 3466 of the Revised Statutes of the United States.

The court below held that in a state receivership involving the competing claims of the United States, the State of Texas and a chattel mortgagee against the assets of an insolvent debtor, the relative priorities are: Texas, first; the mortgagee, second; and the United States, third. The United States contends that under Section 3466 of the Revised Statutes the claim of the Federal Government should have priority over the claim of the State. This federal question was litigated

in the District Court of Greeg County (R. 1, 34–41), and was considered by the Supreme Court of Texas in answer to questions certified by the Court of Civil Appeals (R. 58). After the Court of Civil Appeals had entered its judgment in accord with the answers to the certified questions, the United States again raised the issue by application to the Supreme Court of Texas for a writ of error (R. 73), and again by a motion for rehearing in the Supreme Court of Texas (R. 82) which were denied (R. 82, 83).

The question presented is one of substance. Cf. *New York* v. *Maclay*, 288 U. S. 290; *Spokane County* v. *United States*, 279 U. S. 80; *United States* v. *Knott*, 298 U. S. 544, 549.

QUESTION PRESENTED

Whether, under Section 3466 of the Revised Statutes, the claim of the United States against an insolvent person for gasoline taxes is entitled to priority in payment over the claim of the State of Texas for state gasoline taxes.

STATUTES INVOLVED

The applicable statutes are set out in the Appendix, *infra*, pp. 9–11.

STATEMENT

This case involves the competing claims of the United States, the State of Texas, and a chattel mortgagee against the assets of an insolvent debtor, W. L. Nix. The litigation was initiated on November 20, 1933, in the District Court of Gregg

County, Texas, by a creditor's petition filed by one M. R. Ingram, seeking the appointment of a receiver (R. 1). A receiver was appointed on the same day (R. 4).

Three interventions followed which furnish the basis for this controversy: one by R. P. Ash, a chattel mortgagee, seeking payment of the mortgage indebtedness (R. 5); a second by the State of Texas on account of state gasoline taxes (R. 9); and the third by the United States on account of Federal gasoline taxes (R. 12). Thereafter, one Howard Dailey appeared as successor in interest to the mortgage claim of Ash (R. 15).

The facts, as determined by the trial court (R. 34–40), may be summarized as follows:

On November 20, 1933, and at all times thereafter, Nix was insolvent (R. 40, 58). Upon the sale of Nix's assets and payment of the costs of administration, the receiver turned into the custody of the court the total amount of $7,516.92 (R. 36, 40).

The Ash mortgage note was executed September 19, 1933, and was in the face amount of $4,651.86. The mortgage was duly recorded September 20, 1933, and no payments have been made thereon (R. 39). Of the amount turned into the custody of the court by the receiver, $1,294.80 thereof was allocable to the property covered by the mortgage (R. 38, 40).

The gasoline taxes due to the United States relate to the period May–November 1933, and are in the amount of $19,343.91, including penalty (R. 36, 37, 40, 41).

The taxes, interest, fines, and penalties sought by the State of Texas, are in the total amount of approximately $42,812.51 (R. 37, 40).

The trial court ruled that after the payment of $75 as additional compensation to the receiver, (R. 38) the relative priorities were to be as follows: first, the claim of the mortgagee's successor in the amount of $1,294.80; second, the claim of the United States; and third, the claim of Texas (R. 40–41). However, since the prior claims would exhaust the debtor's assets, nothing would be left to be applied to the claim of Texas.

The State thereupon sought review in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and the appellate court in turn sought instruction from the Supreme Court of Texas by means of certified questions (R. 41). The questions were answered by the Supreme Court of Texas in an opinion (R. 58) which relied largely upon an opinion in a companion case decided the same day (*State* v. *Wynne*, 134 Tex. 455, 133 S. W (2d) 951), the effect of which was to declare, first that the Texas statute (Section 7 of Article 7065a of Vernon's Ann. Civ. St.) giving Texas "a preferred lien, first and prior to any and all other existing liens" upon all the business property of a distributor of gasoline, is valid under both the

state and Federal constitutions; and second, that the claim of Texas is prior to that of the United States, notwithstanding the provisions of Revised Statutes, Section 3466.

In accordance with the answers to the certified questions, the Court of Civil Appeals thereupon ruled that the proper classification of the respective claims was Texas, first, lienholders, second, and United States, third (R. 71). It noted, however, that nothing would remain beyond the amount paid over to Texas (R. 71). The United States filed a motion for rehearing (R. 72), which was overruled (R. 72). The United States then applied to the Supreme Court of Texas for a writ of error (R. 73), which was refused (R. 82), and a motion for rehearing thereafter filed October 15, 1940 (R. 82) was likewise overruled (R. 83).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In granting priority in payment of the claim of the State of Texas over the claim of the United States.

2. In holding that the lien of the State of Texas, if any, was superior to the lien or prior rights of the United States.

3. In reversing the decision and judgment of the District Court of Gregg County, Texas, granting priority in payment of the claim of the United States over the claim of the State of Texas.

REASON FOR GRANTING THE WRIT

Under Revised Statutes, Section 3466, the United States is entitled to priority over the claims of States (see, e. g., *Spokane County* v. *United States*, 279 U. S. 80; *New York* v. *Maclay*, 288 U. S. 290), and such priority prevails even though the State has attempted to give itself a general prior lien on all of the assets of the debtor (*New York* v. *Maclay*, *supra*).

However, as a result of interpretation of Section 3466, the claim of a mortgage creditor precedes the claim of the United States.[1] Accordingly, under Section 3466, the priorities here should be: the mortgage creditor, first, the United States, second, and the state of Texas, third.

Under Texas law, on the other hand, the claim of the State is prior to that of the mortgage creditor. The Texas court therefore ruled that the priorities here must be in the following order: Texas, first, the mortgagee, second, and the United States, third.

But it is plain that regardless of its local policy, the State of Texas cannot vary the priorities established by Section 3466 to the detriment of the United States.

The problem was recognized in *Spokane County* v. *United States*, 279 U. S. 80, and the Court set

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[1] See *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 421, 428; cf. *United States* v. *Hooe*, 3 Cranch 73; *Thelusson* v. *Smith*, 2 Wheat. 396, 426; *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386.

forth without comment the solution suggested by the Government, i. e., that the relative priorities may be preserved by setting apart sufficient funds to pay the mortgagee before paying the federal taxes and then providing for the payment of the state taxes out of the funds so set apart (279 U. S. at 91). Such procedure would recognize the preference given to the mortgagee by the United States, and would give effect *pro tanto* to the priority accorded to the State by its own legislature over the mortgagee.

The question presented involves a rather delicate adjustment of conflicting claims of State and Nation, and it is therefore in the public interest that the question be settled by this Court. Moreover, the question is one which is frequently recurring in the administration of the revenue laws, and it is a matter of general importance that the issue be authoritatively decided.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

MARCH 1941.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 617. TAX ON GASOLINE.

(a) There is hereby imposed on gasoline sold by the importer thereof or by a producer of gasoline, a tax of 1 cent a gallon, except that under regulations prescribed by the Commissioner with the approval of the Secretary the tax shall not apply in the case of sales to a producer of gasoline.

(b) If a producer or importer uses (otherwise than in the production of gasoline) gasoline sold to him free of tax, or produced or imported by him, such use shall for the purposes of this title be considered a sale.

(c) As used in this section—

(1) the term "producer" includes a refiner, compounder, or blender, and a dealer selling gasoline exclusively to producers of gasoline, as well as a producer.

(2) the term "gasoline" means gasoline, benzol, and any other liquid the chief use of which is as a fuel for the propulsion of motor vehicles, motor boats, or aeroplanes.

Revised Statutes:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a

voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. [U. S. C., Title 31, Sec. 191.]

SEC. 3186 [as amended by the Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 613]. (a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) in accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; or

(2) in the office of the clerk of the United States District Court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law provided for the filing of such notice; or

(3) in the office of the clerk of the Supreme Court of the District of Columbia, if

the property subject to the lien is situated in the District of Columbia.

* * * * *

[U. S. C., Title 26, Secs. 1560–1562.]

Vernon's Civil Statutes of Texas:

ART. 7065 a–2. *Occupation or excise tax; rate; reports by distributors to Comptroller.*—(a) There is hereby imposed an occupation or excise tax of four (4) cents on each gallon of motor fuel or fractional part thereof. * * *

* * * * *

ART. 7065 a–7. *State's lien on property of distributor for taxes, fines, etc.*—All taxes, fines, penalties and interest due by any distributor to the State shall be a preferred lien, first and prior to any and all other existing liens, contract or statutory, legal or equitable, and regardless of the time such liens originated, upon all of the property of any distributor, devoted to or used in his business as a distributor, which property shall include refinery, blending plants, storage tanks, warehouses, office buildings and equipment, tank trucks or other motor vehicles, stocks on hand of every kind and character whatsoever used or usable in such business, including crude oil or other materials for the manufacture, refining, blending or compounding of motor fuels and the refined products therefrom and the proceeds from the sale of such materials and refined products, and any other property of every kind and character whatsoever and wherever situated devoted to such use, and each tract of land on which such refinery, blending plant, tanks or other property is located, or which is used in carrying on such business.

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